126255

STATE OF MICHIGAN
IN THE SUPREME COURT

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of KEGAN McCLELLAND, Deceased, and LACY HARTER, Individually and MIKE McCLELLAND, Individually,
Plaintiffs-Appellees,

-vs-

GRAND AERIE FRATERNAL ORDER OF EAGLES,
Defendants-Appellants,

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES, HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES, HARRIS SEPTIC TANK CLEANING & ALWAYS CLEAN PORTABLE TOILET, INC., DALE HARRIS, Individually and AMERICAN CONCRETE PRODUCTS, INC., Individually, and Jointly and Severally,
Defendants.

Supreme Court No. 126255
COA Docket No. 244689
Livingston Circuit Court
No. 00-17892-NO

/

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PLAINTIFFS-APPELLEES' SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO LEAVE/OTHER PEREMPTORY ACTION

PROOF OF SERVICE

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Introduction

Plaintiffs submit this Supplement to respond to Defendant's August 30, 2005 Supplemental Authority Briefs Nos. 1 and 2 and to Argument III in Defendant Grand Aerie's January 24, 2005 Supplemental Brief. The Argument Plaintiffs designate as Argument II in this Supplement corresponds to Defendant's Supplemental Authority No. 1 and to Issue II in Plaintiffs' June 28, 2004 Response in Opposition to Defendant's Application for Leave to Appeal. The Argument designated as Argument III corresponds to Defendant's Supplemental Authority No. 2, to Argument III in Defendant Grand Aerie's January 24, 2005 Supplemental Brief and to Issue III in Plaintiffs' Application Response.

Argument

II. The Facts Of This Case Are Obviously Distinguishable From The Grand Aerie's Supplemental Kentucky Decision, And This Court Should Refuse To Entertain Defendant's Post-Default Challenge To The Denial Of Summary Disposition.

On August 30, 2005, Defendant Grand Aerie filed "Supplemental Authority Brief No. 1" with the slip Kentucky Supreme Court decision in Grand Aerie Fraternal Order of Eagles v Carneyham, 2005 Ky LEXIS 225 (No 2003-SC-0169-DG 8/25/05). Unlike this case, Carneyham did not involve a defective condition on the premises, but rather the issue of whether the Grand Aerie had a duty of supervision to control the actions of guests with respect to alcohol at local Aerie social functions. Carneyham is irrelevant to the issues raised by the Grand Aerie's Application in this case.

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Carneyham was essentially a dramshop negligent supervision claim that was decided based on a legal finding of no duty. Factually, the nineteen-year-old decedent died in a single vehicle accident after she had allegedly been served alcohol at a local chapter of the Eagles, Aerie 4313 (Slip Opinion, pp 1-2). Both the trial court and the Court of Appeals had held that "there was no agency relationship between the Grand Aerie and its local chapters, thus concluding that, as a matter of law, the Grand Aerie could not be held vicariously liable for the negligence of Aerie 4313." That the vicarious liability claim was not appealed and was not before the Kentucky Supreme Court (Slip Opinion, p 2).

As to negligent supervision, plaintiffs alleged that the local Aerie unlawfully sold alcohol in a dry county, unlawfully served alcohol to the underage decedent, and overserved the decedent (Slip Opinion, p 3 Complaint ¶¶ 7-8). Reversing the Kentucky Court of Appeals which had a found factual issue on negligent supervision, the Kentucky Supreme Court held that the Grand Aerie had no "genuine leverage" or control over the actions of members or guests at local chapter social functions and therefore no way to restrict the local Aerie's ability to cause harm (Slip Opinion, pp 19-20). Therefore, defendant owed plaintiff's decedent no duty.

Here, the testimony establishes that the trial court correctly found an issue of fact as to the Grand Aerie's assumption of duty and vicarious liability. The Grand Aerie now falsely claims that "the Supreme Court of Kentucky decided in no uncertain terms that there could be no Vicarious Liability [sic] imposed on Grand Aerie based upon those **identical** Bylaws (known as the Grand Aerie 'Statutes' or

as the 'Constitution' ..." This is not true. The Kentucky Supreme Court did not even have this issue before it. Only the negligent supervision claim was an issue at the Kentucky Supreme Court.

Moreover, of the bylaw provisions discussed in Carneyham, only §89.10 of the Statutes which purports to limit Grand Aerie supervision and control was ever provided to Judge Burress in this case. That section was shown by Plaintiffs to be contradicted by §123.6 which states:

> "In all cases where an Aerie is incorporated, such Articles of Incorporation shall contain therein provisions that **said Aerie is incorporated in conformity with, subject to and under the jurisdiction and control of the Laws of the Fraternal Order of Eagles** (Plaintiffs' Application Appendix Exhibit 11, emphasis added).

Moreover, the premises control issue here, unlike the alcohol control for social guests issue in Carneyham, was fleshed out by the deposition and affidavit testimony including the testimony of the Grand Aerie's secretary, Robert Wahls (Appendix Exhibit 10), the testimony of Richard Downer, secretary of the Michigan Aerie (Appendix Exhibit 6), and Local #3607's trustee, Ivan Brooks (Appendix Exhibit 12). All of this testimony, which was outlined in Plaintiffs' Application Response at pages 20-23, was provided to Judge Burress in response to the Grand Aerie's summary disposition motion filings. Plaintiffs' March 21, 2001 summary disposition response at pages 4-5 advised the trial court that Local #3607 had been having problems with the septic tank for months, that they had removed all of the dirt around the septic tank opening and replaced the cement lid with a plastic riser and plastic lid. But, they never attached the plastic lid to the

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riser. This public health threat existed on the property for many weeks. Mr. Wahls testified that, in such a case, the Grand Aerie had the right to control the situation by sending a commissioner to intervene and rectify the problem (Appendix Exhibit 10: Wahls dep, pp 67; 86). As the Michigan Aerie's secretary Downer testified, "the Grand Aerie gives us the authority to close [a local Aerie] down" (Appendix Exhibit 6: Downer dep, p 48).

This testimony led Judge Burress to find an issue of fact regarding the Grand Aerie's control over local Aerie #3607. There was no such positive evidence of control or "general leverage" in Carneyham. Moreover, the supervision duty the Carneyham plaintiff sought to impose on the Grand Aerie would have been impossible tp enforce. It would have required a representative of the Grand Aerie at every social function. Here, by contrast, the condition of the septic lid and riser was not a transient one like the allegedly overserved decedent in Carneyham. It was a public health threat that by all accounts had gone on for weeks and was there for anyone from the Grand Aerie or the Michigan Aerie whose staff visited the Locals regularly to see. Judge Burress reasonably found a genuine issue of material fact as to the vicarious liability of the Grand Aerie.

This Court should refuse to entertain the Grand Aerie's post-default challenge to summary disposition, but if the Court finds that the denial of the summary disposition is somehow reviewable, the Carneyham decision does nothing to shift the balance away from the trial court's finding that the Grand Aerie was not entitled to summary disposition.

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III. The "High/Low" Agreement Did Not Controvert The Integrity Of The Judicial Process Or Deprive The Grand Aerie Of A Fair Trial, And The Trial Judge Soundly Exercised His Discretion And Properly Refused To Disclose It To The Jury.

The Grand Aerie's Supplemental Authority Brief No. 2 cites Hashem v Les Stanford Oldsmobile, Inc, 266Mich App 61, 81-87 (2005) lv pending, where, after reversing a jury verdict on other grounds, the Court of Appeals, on the unique facts of that case, concluded that the trial court abused its discretion and deprived two non-settling defendants of a fair trial by failing to fashion a disclosure to the jury that reflected the true alignment of the parties. Here, by contrast, the record demonstrates that Judge Burress soundly exercised his discretion by specifically determining that there was "nothing fraudulent about" the high/low agreement and that "it does not deny the non-agreeing defendants a fair trial" (Tr 11/5/01 p 30; Tr 11/13/01, p 202).

In Hashem, before trial, plaintiff entered into a $50,000/$25,000 agreement with one defendant, the nightclub, who was later granted an unappealed directed verdict motion, a $100,000/$90,000 agreement with a second defendant, the Corvette driver, who was later found 30% at fault, and an insurance policy limit agreement for $100,000 with a third defendant, Saks Party Store whose directed verdict was reversed by the panel. All three defendants participated in the trial despite the vigorous objections of the other two defendants. After trial, the Corvette driver who was held 30% at fault, was given a release and satisfaction in the $100,000 amount.

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The Court of Appeals held that the two "high/low" agreements and the policy limits settlement decreased the likelihood that the three defendants were operating as adversarys at trial, and the panel directed the trial court on remand to "craft a means of disclosure that reasonably assures fairness to each of the litigants." 266 Mich App at 87. Clearly, in Hashem, by contrast to the present case, none of the agreements left the three defendants with any real incentive to defend at trial.

Here, Judge Burress exercised his discretion and specifically found "no collusion" and that defense counsel for Howell #3607 had done nothing to antagonize the jury, and "did his best during the course of the trial to keep damages at a minimum" (Tr 10/9/02, pp 74-75). The judge declared that Mr. Cheatham's defense was as vigorous as the defense presented by Mr. Cothorn for the Grand Aerie.

While the Michigan Court of Appeals in Hashem quoted at length from the Florida Supreme Court decision in Dousdorian v Carsten, 624 So2d 241, 243 (Fla 1993), on "Mary Carter"-style agreements, that fact is Florida has specifically not adopted a per se rule banning all "high/low" agreements. Before Dousdorian, in 27th Avenue Gulf Service Center v Smellie, 510 So2d 996, 998 (Fla App 1987), the Florida Court distinguished a $300,000/$100,000 "high/low" agreement from a "Mary Carter" agreement saying that "an agreement where the defendant and plaintiff agree to a minimum and maximum amount of a judgment notwithstanding the jury verdict is a common form of settlement. It does not diminish the liability of one party by proportionately increasing the liability of another party."

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Reversing on grounds of prejudice, the Smellie Court detailed the damage to plaintiff of disclosing the "high/low" agreement to the jury because the jury in that auto collision case, after hearing "from opening statement through closing argument," about "a secret deal," a "conspiracy," an "unsavory agreement," that defense counsel was "like a player who shaves points in a ball game," and a "collusion," returned a verdict against the settling defendant of $600,000 and awarded plaintiff a no cause verdict against the non-settling defendant. Id. at 997-998.

Here, Local Aerie #3607's agreement with Plaintiffs could not have affected liability since it had been determined by the default. The Local Aerie was required to participate in the trial and the amount it had in dispute was in six figures, therefore Local #3607 had plenty of incentive to defend. In Garrett v Mohammed, 686 So2d 629, 269-630 (Fla. App 1966), review den 1997 Fla LEXIS 1150 (Fla 1997), decided three years after Dousdorian, the Court of Appeals recognized that the Dousdorian Court failed to discuss Smellie or to specifically outlaw "high/low" agreements as "Mary Carter" agreements. The Garrett Court said that in Florida "high/low" agreements do not invoke the same dangers as "Mary Carter Agreements" and are not prohibited so long as they are not final settlements and the co-defendant still has a genuine incentive to defend. 686 So2d at 630, n 2.

Ziegler v Wendel Poultry Services, Inc, 615 NE2d 1022 (Ohio 1993), presents an analogous decision from the Ohio Supreme Court. On the first day of trial, Wendel informed the court of a $425,000/$325,000 "high/low" agreement. The judge approved the agreement, and held that it would not be disclosed to the

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jury. 615 NE2d at 1029. Wendel remained in the trial, and the jury ultimately found the co-defendant liable and that Wendel was not liable.

The Ohio Supreme Court found that the "high/low" agreement was not a "Mary Carter" agreement, and that the trial court did not err in allowing Wendel to participate in the trial or by failing to disclose the agreement to the jury. The Court found that the amount of damages assessed against the co-defendant Wynford had no impact on the amount Wendel would pay to Ziegler. There was no built-in incentive on Wendel's part to increase Ziegler's damages. The Ohio Supreme Court quoted from the Ohio Court of Appeals, "the fact that Wendel Poultry remained at risk of liability in a significant amount is indicative of a lack of collusive purpose in executing the agreement," and cited Ohio's evidentiary parallel to MRE 408.

Here, analogously Howell Aerie #3607 had no stake, much less any hidden stake, in Plaintiffs' success against the Grand Aerie. The agreement was freely disclosed to the trial court and to the Grand Aerie. Even with the "high/low" agreement, Local #3607 still had an interest in minimizing its damages and it had no incentive to increase the amount of the verdict against the Grand Aerie because that would not decrease the amount the Local Aerie would might owe Plaintiffs.

From Local #3607's perspective, the "high/low" agreement was good lawyering within the bounds of ethics and fair play. It was motivated by the desire to cap #3607's liability at policy limits, and to protect its insurer from a bad faith claim in a case with the potential for a large verdict and that held little risk of the

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case being lost by the Plaintiffs. From Plaintiffs' perspective, the agreement permitted them to avoid an "empty chair" defense by the Grand Aerie. If left no possibility for complete exoneration of the Local Aerie. Just as there is nothing inherently wrong with a defendant using an "empty chair" defense, there is likewise nothing inherently improper with in a plaintiff anticipating that defense and entering into a "high/low" agreement to avoid the strategy. Moreover, disclosure to the jury of the "high/low" agreement is barred by MRE 408:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

Rule 408 applies equally to settlements with third parties. In Windemuller Electric Co v Blodgett Memorial Medical Center, 130 Mich App 17 (1982), the Court of Appeals held that third-party settlements were inadmissible to prove either the amount of the claim or to prove liability. The trial court had admitted, over defendant's objection, evidence of a settlement agreement that had been made between defendant and its architects. Plaintiff had sued defendant to recover damages for the delay in its work on several phases of a construction project involving the expansion of a hospital. The Windemuller Court explained:

> The rule rests on two considerations. First, evidence of a settlement is not relevant to a defendant's liability since it may be "motivated by a desire for peace rather than from a concession of the merits of the claim". A better justification for the rule, however, is that it promotes "the public policy favoring the compromise and settlement of disputes", FRE 408, Advisory Committee Note, a policy which is in force in this state. The rule promotes that policy in the following

manner: "By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged."

The usual situation in which the rule applies is where a party who is offered a settlement uses that offer against the offeror at the trial of the lawsuit. Nevertheless, the federal authorities have concluded that the rule governs the admissibility of a completed settlement made by one party to the present lawsuit with a third person.

130 Mich.App. at 21-22 (citations omitted). Accord, Mueller & Kirkpatrick, Modern Evidence, § 4.28, p. 400 (1995) ["FRE 408 excludes evidence that a party or witness settled or offered to settle a claim with a third person if offered to prove the validity or invalidity of the claim or its amount in the instant case."]. See also Michigan State Highway Commission v Copper Range Railroad, 105 Mich App 40,44 (1981)[quoting FRE 408 Advisory Committee Note with approval].

Here, the high/low agreement was not a Mary Carter agreement. The record demonstrates that Judge Burress intelligently weighed disclosure of the "high/low" agreement against the countervailing interests and the potential prejudice to the parties. He struck the proper balance, and the Court of Appeals correctly held that the "high/low" agreement with Howell #3607 was properly excluded form the jury.

RELIEF REQUESTED

For the reasons set forth in Plaintiffs' original Response, in their First Supplemental Brief and this Supplemental Brief, the Court should deny Defendant's Application in its entirety.

Respectfully submitted,

Victor S. Valenti

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Dated: October 5, 2005

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No. 00-17892-NO

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Victor S. Valenti, being first duly sworn, deposes and says that on October 5, 2005, he caused to be served copies of Plaintiff-Appellee's Second Supplemental Brief In Opposition to Leave/Other Peremptory Action and this Proof of Service upon:

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by enclosing copies of same in envelopes with first class postage fully prepaid thereon and depositing them in the United States mail at Southfield, Michigan.

Victor S. Valenti

Subscribed and sworn to before me on October 5, 2005.

Kristine A. Gnagey, Notary Public,
Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: 9/4/2012

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